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# In the Supreme Court
## of the United States

OCTOBER TERM, 1966

No. 564

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH,

*Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al,

*Appellees.*

*On Appeal from the United States District Court for the District of Oregon*

## JURISDICTIONAL STATEMENT

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*Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al,

*Appellees.*

*On Appeal from the United States District Court for the District of Oregon*

## JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the United States District Court for the District of Oregon, entered on June 27, 1966, dismissing the complaint of appellants, as plaintiffs in the Court below, which sought to have annulled and set aside an order of the Interstate Commerce Commission which denied appellants leave to file a petition and which denied and rejected their proffered petition to reopen and reconsider the Commission's prior

limited grant of grandfather motor common carrier authority. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.[1]

## OPINIONS BELOW

The opinion and judgment of the District Court of Oregon (unreported) is set forth in Appendix A hereof. The order (unreported) of the Interstate Commerce Commission dated November 3, 1964, referred to in Appendix A hereof, is set forth in Appendix B hereof. A prior related opinion of the District Court (unreported) is set forth in Appendix F hereof. Other relevant reports and orders of the Commission, all under the title of *Produce Transport Dispatch Common Carrier, "Grandfather" Application,* I.C.C. Docket No. MC-117724, are set forth in the following appendices hereof: Appendix C, Report and Order recommended by Joint Board No. 5; Appendix D, Report of the Commission's Division 1, reported in 84 M.C.C. 451; Appendix E, Report of the Commission on Reconsideration, reported in 88 M.C.C. 198; Appendix G, Certificate of Public Convenience and Necessity; and Appendix H, Order dated May 14, 1963.

[1] The United States and the Interstate Commerce Commission were defendants below and are appellees here, and in addition the following parties were intervening defendants below and are in consequence appellees here: Exley Express, Inc., and twenty-one "Class I Railroads in the Western District."

## JURISDICTION

Appellants seek review of the judgment of a three-judge district court in an action brought by appellants seeking to annul and set aside an order of the Interstate Commerce Commission. The lower court judgment sustained the order of the Commission which: (1) denied appellants leave to file a petition; and (2) rejected appellants' petition to reopen and reconsider the disposition previously given by the Commission of appellants' grandfather application for a motor common carrier certificate under the Transportation Act of 1958. The action in the lower court was brought pursuant to the provisions of sections 17(9) and 205(g) of the Interstate Commerce Act, 49 U.S.C. §§ 17(9) and 305(g), and pursuant to the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 inclusive. In accordance with the provisions of section 2284 a three-judge district court was convened to hear the case. The opinion and judgment of the district court was dated and entered on June 27, 1966. Notice of appeal was filed in the district court on July 21, 1966. The jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b). The following decisions sustain the jurisdiction of this Court to review on direct appeal the judgment in this case: *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. Co.*, 320 U.S. 368 (1943); *American Trucking Assns., Inc.* v. *United States*, 364 U.S. 1 (1960); and *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744 (1963).

## QUESTIONS PRESENTED

1. Whether the Commission erred in restricting appellants' grandfather authority by applying legal standards that were later judicially determined to be unduly restrictive and unlawful.

2. Where the appellants had carried frozen fruits, frozen berries, and frozen vegetables in a single field of service, between numerous and representative points in Oregon and Washington on the one hand and on the other numerous and representative points in California, and held out to the shipping public such bona fide services before, on, and after May 1, 1958, whether the Commission may lawfully atomize their existing services as to commodities and territory by a grant that substantially reduces the services they may provide in the future.

3. Whether the Commission denied appellants substantial parity between their bona fide preregulation operations, both as performed and as held out to the public, and their future certificated operations, in substantially reducing and restricting their commodity and territorial authority from that for which they applied.

4. After the courts reversed various Commission decisions, based on restrictive views concerning grandfather operations and on erroneous interpretations of the applicable law and finally after this Court admonished the Commission, whether the Commission by its order of November 3, 1964, abused its discretion in rejecting appellants' petition for reconsideration.

5. In rejecting appellants' petition and refusing to reopen and reconsider their grandfather application, whether the Commission failed and refused to apply the same lawful standards as were required by virtue of court decisions rendered after it first decided upon the scope of authority to be granted to these appellants.

6. Whether the Commission's Reports and Orders of February 14, 1961, and October 24, 1961, impaired appellants' property right to conduct their business as it existed on the grandfather date of May 1, 1958.

7. Whether the fact that the district court had previously sustained the Commission's decision, prior to various court reversals of Interstate Commerce Commission grandfather decisions, gave the Commission adequate grounds for refusing reconsideration to appellants.

8. Whether the Commission was precluded from granting reconsideration of appellants' application because of the fact that the District Court had sustained the Commission prior to the Supreme Court's decision in the Shaw case.

9. Whether, in view of this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159 (1964), the district court herein should have held that the Commission abused its discretion in denying appellants' petition for reconsideration filed August 6, 1964, and remanded this matter to the Commission for further hearing and for reconsideration; or, in the alternative, whether the district court should have vacated its judgment of March 29, 1962, and remanded the matter to the Commission for further hearing and reconsideration in keeping with the law of the *Shaw* case.

## STATEMENT OF THE CASE

Appellants went into the trucking business in 1956 as Produce Transport Dispatch. Until early 1957 they engaged exclusively in the transportation of fresh produce and in March 1957 started transporting frozen fruits, berries, and vegetables. They operated five trucks and six trailers, all equipped with mechanical refrigeration and bunker blowers. Territorially they operated indiscriminately between origins and destinations in Oregon and Washington on the one hand and origins and destinations in California on the other.

Pursuant to section 7(c) of the Transportation Act of 1958 (49 U.S.C. § 303(b)(6) as amended by § 7 of Pub. L. 85-625), in October 1958 appellants filed their application with the Interstate Commerce Commission for a motor common carrier certificate. They requested grandfather authority to transport:

> Bananas, frozen fruits, frozen berries, and frozen vegetables (and also certain specified fresh produce items when moving in mixed shipments with bananas, frozen fruits, frozen berries and frozen vegetables),
>
> between points in Oregon and Washington, on the one hand, and, on the other, points in California.

Hearing was held in December 1959. The application was opposed by the same rail and motor carriers as have intervened herein below. In their hearing appellants showed that their operations had been continuous

since 1956 and with the same size of fleet of refrigerated trucks and trailers; that they operated their own shop for maintenance of the equipment; and that they had filed tariffs of rates and charges with the Commission.

They also showed that since March 1957 and on May 1, 1958 (the "grandfather" date specified in the 1958 Act), and continuously thereafter they had been transporting frozen fruits, berries, and vegetables; that these items had been handled in mixed and in straight shipments, in mixed and in straight loads, and these newly regulated items had also been handled in mixed shipments and mixed loads with exempt commodities. For example, in their abstracts of shipments handled before and after the critical date they had transported such mixed shipments as those containing frozen fruits and frozen vegetables, frozen vegetables and frozen berries, and frozen fruits and frozen berries. Approximately one-fourth of the shipments moved were of mixed frozen items, and a large number of full-load shipments contained mixtures of frozen fruits, berries, and vegetables.

Appellants' tariff provided complete rates and charges for total territorial coverage of the scope of services held out and provided to that segment of the shipping public dealing in these frozen items, to and from any points in the three west coast states. They actively solicited the shipping of frozen fruits, berries, and vegetables indiscriminately and among producers, brokers, packers, and buyers, out of the home office in Portland, Oregon, and by employed agents in California. All ship-

ments tendered were handled without regard to the location of origin or destination within the three states served.

Before and after the critical date appellants handled shipments from 14 different origins in Oregon, from 17 different origins in Washington, and from 4 different origins in California. This traffic moved to 4 different destinations in Oregon, to 3 different destinations in Washington, and to 38 different destinations in California.

Origin and destination areas changed and varied from time to time, depending upon crops, prices, packs, demand, supply, seasons, and plant changes. A full and complete motor transport service for these frozen items, as well as fresh produce, was made available, held out, provided and used—in the States of Washington, Oregon, and California—both before and continuously after May 1, 1958.

The case was heard by Joint Board 5 and in December 1959 it issued a report and order (see Appendix C hereof) in which it found that appellants were, on and after May 1, 1958, engaged in bona fide operations and should be granted common carrier, irregular route, authority to transport:

> frozen fruits, frozen berries, and frozen vegetables, and frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh dry onions, fresh avocados, and fresh fish in mixed shipments with frozen fruits, frozen berries, and frozen vegetables,
>
> between points in Oregon and Washington, on the one hand, and, on the other, points in California.

Exceptions and reply thereto were filed with the Commission and in February 1961 Division 1 of the Interstate Commerce Commission issued its report and order (set forth as Appendix D herein). In many material respects this Division 1 report reversed the joint board in concluding that only a fragmentary portion of the authority previously recommended should be granted. It proposed a separate grant for each of the three frozen items, and as to each, granted severely restricted "point-to-point" authority, as follows:

(1) Frozen fruits, from Portland, Oreg., to Sacramento, Calif.;

(2) Frozen berries, (a) from Portland, Oreg., to Los Angeles, Long Beach, and San Francisco, Calif.; (b) from Stayton and Gresham, Oreg., to San Francisco, Calif.; and (c) from Forest Grove, Oreg., to Los Angeles, Calif.;

(3) Frozen vegetables, (a) from Portland, Oreg., to Sacramento and San Francisco, Calif.; (b) from Gresham, Stayton, and Weston, Oreg., to San Francisco, Calif.; and (c) from Sumner, Wash., to Los Angeles, Calif.

Appellants immediately filed a petition for reconsideration which was promptly denied by Commission order dated June 29, 1961. On August 21, 1961, the Commission on its own motion reopened the case for the limited purpose of correcting Division 1 in its refusal to consider a late-filed amendment to the application, so that in this respect the final decision would square with the Commission's reversal by a federal district court in *Herrett Trucking Co.* v. *United States* (unre-

ported), but found in 14 Federal Carrier Cases, page 50357 (E. D. Wash., 1961). This particular order of the Interstate Commerce Commission on reconsideration is Appendix E hereof.

Immediately thereafter appellants filed a suit in the United States District Court of Oregon in which it requested the court to review and set aside the Commission's restrictive interpretation and application to them of the 1958 law. This was one of many such suits and the earliest to be decided. The court summarily found no fault with the Commission's action and in the first of only about two cases which affirmed the Interstate Commerce Commission the court denied appellants the relief sought. The court's order of March 29, 1962, is attached hereto as Appendix F.

Subsequently, then, a Certificate was issued. (See Appendix G hereof.)

In the meantime, the Commission was defending itself against a spate of cases for similar reasons. The first major court directive was in *Winter Garden Company* v. *United States*, 211 F. Supp. 280 (E. D. Tenn., 1962) reversing the Commission on its interpretation and application of this law. In the *Winter Garden* case the court held, in part, that frozen fruits, berries, and vegetables ought not to be construed as separate classes of property so that the carriage of each had to be viewed separately and apart from the others; that the Commission should consider the changing characteristics of this particular traffic when determining the scope of prior bona fide operations; and that it was not necessary for

a grandfather applicant to prove service between the same pair of points both before and after May 1, 1958, if its operations had been between geographical areas and were continuous and substantial.

With this new doctrine, which changed the course and outcome of many grandfather cases under the 1958 Act, the appellants filed another petition to reopen their docket. This was also denied by the Commission. (See Appendix H herein.) In part the Commission said:

> ". . . the petition . . . is hereby, denied, for the reasons that the findings of the Commission in its report on reconsideration of October 24, 1961, are in accordance with the evidence and the applicable law; . . ."

Within sixty days thereafter three more different federal district courts concluded that the Interstate Commerce Commission's limited grandfather grants were based upon restrictive views and erroneous interpretations of the applicable law.[2]

Finally, on May 4, 1964, the Supreme Court in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* 377 U.S. 159 (1964), admonished the Commission to measure section 7(c) applications by the standards explicated in *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475 (1942), in construing the cognate provisions of section 206(a) of the 1935 Act (49 U.S.C. § 306(a)).

Inasmuch as the cardinal principles applicable to

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[2] *Jarman* v. *United States,* 219 F. Supp. 108 (D. Md., June 18, 1963); *Frozen Food Express* v. *United States,* 219 F. Supp. 131 (N.D. Tex., July 8, 1963); *Hale Distributing Co.* v. *United States,* 221 F. Supp. 266 (S.D. Cal., July 8, 1963).

grandfather cases, spelled out by this Court in the *Carolina Carriers* case, *supra*, twenty-two years before, were restored by this Court in the *Shaw* case, *supra*, appellants proffered dual petitions to the Commission in August 1964, one requesting the Commission to waive its rules and the other to reopen and reconsider their application in the new light of the law as just interpreted by the federal courts. By its order of November 3, 1964 (Appendix B hereof), the Commission denied the petition for leave to file a petition for reconsideration and rejected the tendered petition.

On reference to said Commission order it is to be noted that for the first time the Interstate Commerce Commission took cover under the first district court judgment (Appendix F hereof), although that judgment preceded all of the decisions resulting in basic changes in its grandfather determinations. The order also states that there is no conflict between the 1962 decision by the Oregon District Court and this Court's 1964 decision in *Willis Shaw, supra.*

Therefore the instant action was brought.

Appellants contend that:

1. Their grandfather rights were determined under strict principles which were being followed by the Commission at the time, and that those principles were later determined by the courts to be unduly restrictive and unlawful;

2. The principles and law set forth in decisions after 1962 and in *Carolina Carriers, supra,* have not been applied to them;

3. The Commission should have reopened and reconsidered their application and should be required to do so;

4. If necessary to receive additional relevant evidence with respect to appellants' holding out and actual operations, which was offered and rejected at the hearing, the Commission should hold a further hearing on the appellants' application;

5. In reconsidering appellants' application and grant the Commission should make actual, specific findings with respect to each current legal principle that should be applied;

6. Appellants should be awarded grandfather authority that is commensurate with their bona fide operations before and after May 1, 1958, so that there will be substantial parity between their preregulation and their postregulation operations;

7. Without such full and fair treatment by this Court and by the Commission, valuable property rights of the appellants will have been irrevocably impaired; and

8. Without such having been done these appellants will have been denied equal protection of the laws.

## QUESTIONS ARE SUBSTANTIAL

From the foregoing statement the conclusion would seem to be inescapable that the questions presented are so substantial as to require this Court's plenary consideration and ultimate mandate.

When the House Committee on Interstate and Foreign Commerce was considering a proposal to liberalize the then proposed Transportation Act of 1958, Mr. Harris, the Committee Chairman, said:

> ". . . The bill provides for 'grandfather' rights so [sic] those common or contract carriers by motor vehicle which are now engaged in the transportation of these commodities. [Referring to frozen fruits, berries, and vegetables.] They will be permitted to continue the service they are now performing. Therefore, this industry would not be hindered or hampered in any way."

Section 7(c) of the Act spells out the standards to be applied by the Commission in disposing of grandfather applications, but there is nothing in this section that authorizes the restrictions imposed by the Commission in the present case.

Seemingly, substantial parity between the carrier's preregulation and postregulation operations was guaranteed. The grandfather applicant was to be provided with a certificate or permit that conformed with the bona fide operations it was offering and performing. It was not to be required to prove "public convenience and necessity" or any other standard not specified in section 7(c).

Grandfather applicants were only required to file an application on time and thereafter, with or without hearing, to show that they were in bona fide operation before, on, and continuously after May 1, 1958. A common carrier's "bona fide operation" means only that it holds itself out to provide service in the transportation either

of certain or general commodities either between specified points or between general areas, and that it can and has demonstrated its actual ability to do so by having substantially performed such service.

It is obvious by the Commission's handling of this case and of many others, some of which went into the courts, that in its earlier dispositions of grandfather applications under the 1958 Act it construed and applied section 7(c) very strictly and without the requisite liberality. Its precourt, strict construction was applied to the appellants. It treated each frozen item handled and applied for separately and without regard to the fact that applicant handled them indiscriminately for the same people and industry, in the same areas, in the same vehicles, at the same time, and in the same field of service. It disregarded evidence offered with respect to changes in the frozen foods industry and market and it checked off all points between which shipments did not move both before and after the grandfather date. In fact, it atomized by restricting the appellants to a few point-to-point movements what had been a service between geographic areas. It tendered the appellants a certificate that made it impossible to continue the services and operations previously conducted for many years.

That the Commission was misapplying the 1958 Act was equally obvious by virtue of the several federal district court decisions and remands, commencing with *Winter Garden, supra,* and running through three more in 1963. Then, in 1964 it was directed by this Court in *Willis Shaw, supra,* to apply the standards established earlier in *Carolina Carriers, supra.*

Thus, after disposition of appellants' case, the standards to be lawfully applied were radically different from those previously used by the Commission. Furthermore, they were to be liberally construed and applied.

Thereafter the Commission did reopen and apply the more liberal standards to many grandfather applications. But it repeatedly refused to do so with the instant case. Appellants have been denied equal protection of laws. Of an even more serious nature, appellants have suffered the very effective impairment of valuable, substantial property rights.

Appellants submit and assert that there is no real, valid reason why the Commission should not reopen and reconsider their case in line with present standards. It has done so in many other similar dockets. Such refusals appear to be arbitrary and capricious and abusive of an administrative agency's discretionary powers.

## CONCLUSION

For the reasons stated above we request that probable jurisdiction of this appeal be noted; or, in the alternative, that the judgment of the court below be reversed summarily, and that the case be remanded to the Commission for reconsideration. While we are cognizant of the Court's reluctance to take action without plenary hearing, it is respectfully suggested that such action would be appropriate in this case where the error is plain, where the result would be only reconsideration by the agency, and where it is impossible to perceive any

damage to the public interest during the period of reconsideration.

Respectfully submitted

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Attorneys for Appellants

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| FRANK P. BATTAGLIA and THOMAS TORCHIA, a partnership doing business as PRODUCE TRANSPORT DISPATCH, Plaintiffs, | ) | Civil No. 65-592 |
| vs. | ) | OPINION |
| UNITED STATES OF AMERICA, Defendant. | ) | |

Before: HAMLEY, Circuit Judge, and SOLOMON and KILKENNY, District Judges.

PER CURIAM:

In form, this is a proceeding to review an order of the Interstate Commerce Commission, dated November 3, 1964, denying the petition of the plaintiff, filed on August 6, 1964, for leave to file a petition for rehearing, and denying the petition of the plaintiff for reconsideration, tendered to the Commission for filing on August 6, 1964. In effect, however, it is a proceeding in this Court to vacate the judgment of this Court, rendered on March 20, 1962, affirming the order of the Commission, dated October 24, 1961.

Regarding the proceeding as one to review the described Commission order, we affirm on the ground that the Commission did not abuse its discretion in denying the petition for reconsideration on the grounds set forth in the Commission order. Regarding the proceeding as one to vacate the previous judgment of this

Court, we hold that no adequate ground for vacating that judgment has been shown.

Dated this 27th day of June, 1966.

FREDERICK G. HAMLEY
Circuit Judge

GUS J. SOLOMON
District Judge

JOHN F. KILKENNY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| FRANK P. BATTAGLIA and THOMAS TORCHIA, a partnership doing busines as PRODUCE TRANSPORT DISPATCH, Plaintiffs, | ) | Civil No. 65-592 |
| vs. | ) | JUDGMENT |
| UNITED STATES OF AMERICA Defendant. | ) | |

Before: HAMLEY, Circuit Judge, and SOLOMON and KILKENNY, District Judges.

Pursuant to the opinion by this Court rendered herein on this date, it is

ORDERED and ADJUDGED that the action herein be, and the same is hereby, dismissed.

Dated this 27th day of June, 1966.

FREDERICK G. HAMLEY
Circuit Judge

GUS J. SOLOMON
District Judge

JOHN F. KILKENNY
District Judge

## APPENDIX B

### ORDER

SERVICE DATE
NOVEMBER 18, 1964

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 3rd day of November, A. D. 1964.

No. MC-117724
PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION
(Renumbered and Re-entitled)

No. MC-124603
FRANK P. BATTAGLIA AND THOMAS TORCHIA COMMON CARRIER "GRANDFATHER" APPLICATION

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicants filed August 6, 1964, for leave to file petition for reconsideration;

(2) Petition of applicants tendered for filing August 6, 1964, for reconsideration;

(3) Reply by Exley Express, Inc., filed August 25, 1964;

(4) Joint reply by Class I rail carriers in the Western District, and the former member lines of the Pacific Southwest Railroad Association, protestants, filed August 20, 1964;

and good cause appearing therefor:

*It is ordered,* That the petition for leave to file in (1) above and the tendered petition in (2) above be, and they are hereby, denied and rejected, respectively, for the reasons that the findings of the Commission in its report on reconsideration of October 24, 1961, in this proceeding were affirmed in *Battaglia et al.* v. *United States and Interstate Commerce Commission,* (C.A. No. 61-321, U.S.D.C., D. Oregon, March 29, 1962), that the decision of the Supreme Court of the United States in *Willis Shaw Frozen Express, Inc.* v. *United States et al.* (84 S. Ct. 1154, 1964) does not conflict with the said court decision of March 29, 1962, and that no sufficient or proper basis appears at this time for waiving Rule 1.101(e) of the Commission's General Rules of Practice and accepting the tendered petition for reconsideration for filing.

By the Commission.

(SEAL)

HAROLD D. MCCOY,
Secretary.

## APPENDIX C

### INTERSTATE COMMERCE COMMISSION

Served December 21, 1959

### NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary Interstate Commerce Commission, Washington, D.C., and served on all other parties in interest, within 35 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 25 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise woud be applicable to this proceeding.

The certificate or permit will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-117724

PRODUCE TRANSPORT DISPATCH
COMMON CARRIER "GRANDFATHER"
APPLICATION

Decided

Applicants found entitled to continue operations as a common carrier by motor vehicle, of frozen fruits, frozen berries, and frozen vegetables, between points in Oregon and Washington, on the one hand, and, on the other, points in California, over irregular routes, by reason of having been engaged in such operations on and continuously since May 1, 1958. Issuance of certificate authorized.

*Stephen Parker* for applicants.

*W. S. Pilling, James T. Johnson,* and *Robert B. Batchelder* for protestants.

REPORT AND ORDER

RECOMMENDED BY JOINT BOARD NO. 5[1] COMCOMPOSED OF GEORGE E. HOWARD OF CALIFORNIA, JAMES E. SINGLETON OF OREGON AND J. ANDREW BROOKS OF WASHINGTON

By application filed October 20, 1959,* as amended, under the "grandfather" provisions of section 7(c) of the Transportation Act of 1958, Frank P. Battaglia,

[1] The State of California has waived its right to participate in this proceeding, as the joint board member from that State failed to appear at the hearing.

* Should be corrected to read "October 20, 1958."

Louis Roberti, and Thomas Torchia, co-partners, doing business as Produce Transport Dispatch, of Portland, Oreg., seek a certificate of public convenience and necessity authorizing the continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of bananas, frozen fruits, frozen berries, and frozen vegetables, and of exempt commodities, including but not limited to frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh squash, fresh dry onions, fresh avocados, frozen fish, frozen fish products, fresh fruits, and fresh vegetables, when transported in mixed shipments with bananas, frozen fruits, frozen berries, and frozen vegetables, between points in Oregon and Washington, on the one hand, and, on the other, points in California.

The application was referred to Joint Board No. 5 for hearing and the recommendation of an appropriate order thereon. Hearing was held on December 8, 1959, at Portland. Pacific Intermountain Express Co., Exley Express, Inc., Class I Rail Carriers in the Western District and member lines of the Pacific Southwest Railroad Association oppose the application.

Since 1956, applicants have been engaged in operations as a common carrier by motor vehicle of various commodities formerly exempt from regulation under Section 203(b)(6) of the Interstate Commerce Act in California, Oregon, and Washington. Prior to May 1, 1958, they transported 37 shipments of frozen fruits, frozen berries, and frozen vegetables from numerous specified points in Oregon and Washington to specified

points in California; and 2 shipments of the same commodities from points in California to those in Oregon and Washington. Subsequently to that date they have transported 186 shipments of the considered frozen commodities from points in Oregon and Washington to specified points in California; and 7 shipments from points in the latter State to those in Oregon and Washington. On occasions, applicants have transported frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh dry onions, fresh avocados, and frozen fish in mixed shipments with the involved frozen fruits, vegetables, and berries. In 1957, in mixed shipments with other commodities, applicants transported four shipments of bananas from Los Angeles, Calif., to Portland.

Section 7(c) of the Transportation Act of 1958, provides, among other things, that a certificate, in the case of a common carrier, shall be issued an applicant who was in *bona fide* operation on May 1, 1958, and has so operated since that time, except as to interruptions of service over which it or its predecessor in interest had no control. In the circumstances, an applicant for a "grandfather" certificate must present evidence of having conducted substantial operations within the scope of its application both prior and subsequent to the statutory date. A mere holding out to furnish the transportation service during such period is not a substitute for actual operations.

Based on the evidence adduced, the joint board is convinced that applicants' past operations in the transportation of frozen fruits, frozen berries, and frozen veg-

etables warrants a grant of authority to the extent sought. In addition, they have clearly evidenced a need for authority permitting the transportation of these commodities in mixed shipments with exempt commodities. In recommending a grant of State-wide authority, the board has considered the diversity of applicants' past operations within each of the involved States. On the other hand, however, applicants' evidence with respect to past shipments of bananas is insufficient to warrant a grant of authority authorizing their continued transportation. As seen, no shipments of such commodity have been transported subsequent to the "grandfather" date.

## FINDINGS

The joint board finds that, on May 1, 1958, applicants were in *bona fide* operations as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, and of frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh dry onions, fresh avocados, and fresh fish in mixed shipments with frozen fruits, frozen berries, and frozen vegetables, between points in Oregon and Washington, on the one hand, and on the other, points in California, and have so operated since; and that a certificate of public convenience and necessity authorizing continuance of such operations should be issued to the applicants.

In view of the findings herein, the joint board recommends that the appended order be entered.

By Joint Board No. 5.

(Signature) JAMES E. SINGLETON
(Signature) J. ANDREW BROOKS

Recommended by Joint Board No. 5 composed of George E. Howard of California, James E. Singleton of Oregon, and J. Andrew Brooks of Washington

(Signature) JAMES E. SINGLETON
(Signature) J. ANDREW BROOKS

## ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the.....day of..... A.D. 1959.

No. MC-117724

## PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by Joint Board No. 5, which board has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

*It is ordered,* That upon full compliance with the requirements of sections 215, 217, and 221(c) of the In-

terstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicants authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

*It is further ordered,* That the application in all other respects be, and it is hereby, denied.

*And it is further ordered,* That this order shall be effective on.....

By the Commission, division 1.

HAROLD D. McCOY,
Secretary

(SEAL)

## APPENDIX D

## INTERSTATE COMMERCE COMMISSION

No. MC-117724

## PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION

Decided February 14, 1961

Applicants found entitled to continue operations as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, from and to specified points in Oregon, Washington, and California, by reason of having been engaged in such operations on and continuously since May 1, 1958. Issuance of a certificate approved upon compliance by applicants with certain conditions, and application in all other respects denied.

*Stephen Parker* for applicants.

*W. S. Pilling, James T. Johnson, Randall B. Kester* and *Robert B. Batchelder* for protestants.

### REPORT OF THE COMMISSION

### DIVISION 1, COMMISSIONERS MURPHY, WEBB AND HERRING

BY DIVISION 1:

Exceptions to the order recommended by the joint board were filed by protestants, and applicants replied.

Our conclusions differ in part from those recommended.

By application filed October 20, 1958, as amended, under the "grandfather" provisions of section 7(c) of the Transportation Act of 1958[1], Frank P. Battaglia, Louis Roberti, and Thomas Torchia, copartners, doing business as Produce Transport Dispatch, of Portland, Oreg., seek a certificate of public convenience and necessity authorizing the continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of bananas, frozen fruits, frozen berries, and frozen vegetables, and of exempt commodities, including but not limited to, frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh squash, fresh dry onions, fresh avocados, frozen fish, frozen fish products, fresh fruits, and fresh vegetables, when transported in mixed shipments with bananas, frozen fruits, frozen berries, and frozen vegetables, between points in Oregon and Washington, on the one hand, and, on the other, points in California. Pacific Intermountain Express Co., Exley Express, Inc., hereinafter called P.I.E. and Exley, respectively, Class I rail carriers in the Western District, and the Pacific Southwest Railroad Association oppose the application.

The board recommended that applicants be authorized to transport frozen fruits, frozen berries and frozen vegetables, and frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh dry onions, fresh avocados, and

[1] See footnote 1 to section 203(b)(6) of the Interstate Commerce Act, as amended August 12, 1958. Section 7 of the Transportation Act of 1958, in amending section 203(b)(6), includes the "grandfather" provisions pursuant to which this application is filed.

fresh fish in mixed shipments with frozen fruits, frozen berries, and frozen vegetables, between the points and in the manner described in the application. In separate exceptions, P.I.E. contends that authority should be granted here only to transport frozen fruits, frozen berries, and frozen vegetables from points in Oregon and Washington west of the Cascade Mountains to points in California; Exley contends that the grant here should be only to transport frozen fruits, frozen berries, and frozen vegetables from Portland, Salem and Forest Grove, Oreg., and from Sumner, Wash., to Los Angeles, San Francisco, Sacramento, and Long Beach, Calif., and from Gresham and Stayton Oreg., to San Francisco. The rail carriers, in joint exceptions, say that the application should be denied except for the transportation of frozen uncooked vegetables, frozen fruit, and frozen berries from Portland, and frozen berries from Forest Grove, to Los Angeles and San Francisco. In support of their respective positions, exceptants collectively assert that applicants were not in bona fide operation on and continuously after May 1, 1958 to the extent required for a grant of the authority recommended. Rail carriers argue (1) that the application was amended at the hearing to include the transportation of so-called exempt commodities in mixed shipments with "grandfather" commodities, (2) that the board was in error in accepting such amendment because, as a matter of law, the scope of a "grandfather" application may not be broadened by amendment after December 10, 1958, (3) that, in any event, applicants have failed to establish their bona fide operation in the transportation

of mixed shipments, (4) that no authority to transport squash should be granted since squash, when frozen, has been so cooked as to change its consistency, and (5) that no authority to transport frozen vegetables other than frozen uncooked vegetables should issue here.

In reply applicants contend generally that they have established their bona fide operation to the extent recommended by the board. They argue (1) that the recommended territorial grant of authority is justified by (a) the representative points in each of the three States from and to which applicants actually transported the involved commodities before or after, or both before and after, the critical date, and (b) applicants' holding out to serve all points in the involved area[2]; (2) that the Commission should take official notice that the transportation of frozen fruits, berries, and vegetables is a specialized industry in which the shippers are constantly developing new and varied markets, which situation results in a need for territorial grants of authority for carriers transporting these commodities; (3) that the instant application was mailed for filing on October 15, 1958 on Form BOR 1; (4) that in November 1958, the "second supplement" to said application form was issued, which supplement directed "grandfather" applicants to include on Form BOR 1 a request for mixed shipment authority; (5) that in November 1959 applicants' authority contacted this Commission and was informally advised that a "mixed shipment" amendment tendered at the hearing would be accepted; (6) that to

[2] In support of this argument, applicants cite, among others, *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

deny applicants the right of amendment would, in effect, constitute a penalty for the early filing of their application, (7) that the tendered amendment did not constitute a broadening of the issues, and is therefore acceptable, (8) that the Commission has the power to issue "mixed shipment" authority in "grandfather" proceedings, and should do so here, and (9) that, with respect to the commodity description "frozen vegetables," applicants seek no authority other than that properly embraced in such term.

The evidence, the board's recommendations, the exceptions, and the replies thereto have been considered. We find the board's statement of fact to be adequate for determination of the issues; and, as hereinafter supplemented, adopt it as our own. To the extent that no exceptions are taken to the recommended partial denial of the application, the board's findings are justified by the evidence; and we adopt them as own.

Applicants are engaged in the transportation of "exempt" and "formerly exempt" commodities within the States of California, Oregon, and Washington. They operate sufficient and adequate equipment with which to perform the proposed service, and have a published tariff for the involved transportation. Hearing was held on December 2, 1959, at which time applicants tendered, and the board accepted, an amendment to the application, which amendment seeks authority to transport numerous "exempt" commodities in mixed shipments with the "grandfather" commodities enumerated in the original application. In support of the operations

claimed, applicants introduced shipping abstracts of transportation performed by them from March 1957 to December 1959. As pertinent, these abstracts are summarized in the appendix hereto. However, in view of our conclusions herein we have omitted from our appended summary any shipments other than of frozen fruits, berries, and vegetables. In brief, applicants' shipping abstracts show (1) that they transported fruits[3] only from Portland, Oreg., to Sacramento, Calif., both before and after the critical date, and that they transported a total of five shipments of frozen fruits from all origin points prior to the critical date, and 50 shipments from all origin points thereafter, (2) that applicants transported shipments of frozen berries both before and after May 1, 1958, from Portland to Los Angeles, Long Beach, and San Francisco, Calif.; from Forest Grove, Oreg., to Los Angeles; and from Stayton and Gresham, Oreg., to San Francisco; and that they transported a total of 23 shipments of frozen berries prior to the critical date, and 107 shipments thereafter, and (3) that applicants transported frozen vegetables both before and after the critical date only from Portland to Sacramento and San Francisco; from Gresham, Weston, and Stayton, Oreg., to San Francisco; and from Sumner, Wash., to Los Angeles; and that they transported a total of 16 shipments of frozen vegetables prior to May 1, 1958, and 132 shipments thereafter. Many of the shipments shown were transported in movements involving multiple pickups or deliveries. Moreover, certain shipments of frozen

[3] Shipments entitled "cherries" and "grapes" have been included by us in the commodity description "frozen fruits."

vegetables originating at Gresham include squash which is cooked from 20 to 30 minutes before it is frozen. Applicants transported no shipments of the involved commodities from any point in California both on and after May 1, 1958, and originated but three shipments from all points in California prior to the critical date.

Section 7 of the Transportation Act of 1958 provides, among other things, that all applications for authority thereunder be filed no later than December 10, 1958. The application here, as filed in October 1958, contained no request for authority to transport so-called exempt commodities in mixed shipments with the involved "grandfather" commodities. The amendment tendered at the hearing for such authority broadens the scope of the original application; is, in effect, a request for additional "grandfather" rights; and must be rejected since it was tendered for filing after December 10, 1958. See *Lamb Common Carrier Application*, 83 M.C.C. 91. That an employee of this Commission, in November 1959, may have informally advised applicants that such amendment would be acceptable is of no import, since the statutory date for filing "grandfather" applications was, at that time, long past. Similarly, that applicants filed this application prior to the issuance of the "second supplement" to Form BOR 1, does not alter the result here. Although this informational supplement advised "grandfather" applicants that they might specifically seek mixed shipment authority, the aforementioned provisions of section 7 of the Transportation Act of 1958 control this situation. In any event, applicants had until December 10, 1958, in which to seek by a new or amend-

ed application such additional "grandfather" rights, and failed to do so. Our rejection of this amendment is, of course, without prejudice to applicants' right to seek an appropriate certificate for additional authority under section 207(a) of the Interstate Commerce Act.

In proceedings of this nature an applicant is required to establish that it was in bona fide operation on May 1, 1958, and continuously thereafter. This statutory standard had been construed to connote actual, substantial service as distinguished from the mere holding out of service. *Long Common Carrier Application,* 81 M.C.C. 689, citing, among others, the *Carolina Freight Carriers,* case, *supra.* Stated in other words, the requirement of bona fide operation does not comprehend a grant of "grandfather" authority other than between points actually served both on and continuously after the critical date, unless the substantiality of the operations involved reflect an area-wide pattern of service. We do not agree with applicants' contention that shipments of the three involved commodities transported by them should be viewed collectively in establishing their bona fide operation. The *Carolina Freight Carriers Case,* upon which applicants primarily rely in support of this argument, discussed a "grandfather" application to transport *general commodities.* There, the Supreme Court stated that ". . . if the applicant has carried a wide variety of general commodities, he cannot necessarily be denied the right to carry others of the *same class* merely because he never carried them before . . ."[4] (emphasis ours). Section 7 of the Transportation Act of

[4] 315 U. S. at 483.

1958 clearly enumerates several *specific classes* of commodities, including frozen fruits, frozen berries, and frozen vegetables, to which "grandfather" applications may be directed. In our opinion, applicants here must establish their bona fide operation separately with respect to each commodity class involved.

Bearing in mind the above, we believe that applicants have established the right to a certificate authorizing operations only from and to the points served by them both on and after the critical date as described in our findings. Applicants have not transported any of the subject commodity classes to or from more than four points in any State involved. We are unable to view these points served as sufficiently representative to warrant a finding that applicants' operations were substantial throughout the State-wide areas involved. We are not persuaded that we should take official notice, as requested by applicants, that the changing business characteristics in the industries which applicants serve require flexible carrier service and that this fact should be considered in determining the scope of the grant here. While this situation, in truth, may exist, we do not believe that the relatively limited operations by applicants which occurred on or prior to May 1, 1958, appear compatible with the fact of which they seek to have us take notice.

With regard to rail protestants' assertion that any grant here to transport frozen vegetables should be restricted to "frozen uncooked vegetables," the discussion in No. MC-112854 (Sub-No. 14), *Hollebrand Common*

*Carrier Application-Section 7(c)*, — M.C.C. —, (decideded November 28, 1960) is pertinent here. Citing *Frozen Cooked Vegetables—Status*, 81 M.C.C. 649, the *Hollebrand* case pointed out that any vegetable which has been cooked to the point of material change in the texture of the raw articles or has undergone infusion of a foreign substance is no longer a vegetable but is, in fact, a prepared food. Our grant here confers authority only to transport frozen vegetables. We do not consider the instant record complete enough to indicate just what conclusion should be reached with respect to squash.

In view of our findings herein we deem it unnecessary to discuss the other matters raised by the pleadings.

We find that applicants were, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of:

(1) Frozen fruits, from Portland, Oreg., to Sacramento, Calif.;

(2) Frozen berries, (a) from Portland, Oreg., to Los Angeles, Long Beach, and San Francisco, Calif.; (b) From Stayton and Gresham, Oreg., to San Francisco, Calif.; and (c) From Forest Grove, Oreg., to Los Angeles, Calif.;

(3) Frozen vegetables, (a) from Portland, Oreg., to Sacramento and San Francisco, Calif.; (b) from Gresham, Stayton, and Weston, Oreg., to San Francisco, Calif.; and (c) from Sumner, Wash. to Los Angeles, Calif.;

and have so operated since that time; that a certificate

authorizing the continuance of such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicants with the requirements of sections 215, 217, and 221(c) of the act, and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

An appropriate order will be entered.

COMMISSIONER HERRING concurs in the result.

## APPENDIX
## FROZEN FRUITS

| Origin | Destination | 1957 | 1/1/58 to 5/1/58 | 5/2/58 to December 1959 |
|---|---|---|---|---|
| Portland, Oreg. | Sacramento, Calif. | 1 | | 5 |
| Portland, Oreg. | Fresno, Calif. | | | 1 |
| Portland, Oreg. | Glendale, Calif. | | | 1 |
| Portland, Oreg. | Los Angeles, Calif. | | | 8 |
| Portland, Oreg. | San Francisco, Calif. | | | 5 |
| Portland, Oreg. | San Leandro, Calif. | | | 2 |
| Portland, Oreg. | Bakersfield, Calif. | | | 1 |
| Portland, Oreg. | Santa Clara, Calif. | | | 3 |
| Portland, Oreg. | Oakland, Calif. | | | 3 |
| Salem, Oreg. | Los Angeles, Calif. | 2 | | |
| Eugene, Oreg. | Sacramento, Calif. | | | 1 |
| Eugene, Oreg. | Los Angeles, Calif. | | | 1 |
| Gresham, Oreg. | San Francisco, Calif. | | | 1 |
| (Weston, Oreg. ( | Fresno, Monterey, Glendale, San Luis Obispo, Riverside, Calif. | | | 1 |
| Forest Grove, Oreg. | Los Angeles, Calif. | | | 1 |
| Sunnyside, Wash. | Glendale, Calif. | | | 1 |
| Sunnyside, Wash. | Los Angeles, Calif. | | | 1 |
| Sumner, Wash. | Los Angeles, Calif. | 1 | | |
| Seattle, Wash. | Los Angeles, Calif. | 1 | | |
| Walla Walla, Wash. | Oakland, Calif. | | | 1 |
| Walla Walla, Wash. | Los Angeles, Calif. | | | 2 |
| Yakima, Wash. | Los Angeles, Calif. | | | 4 |
| Puyallup, Wash. | Los Angeles, Calif. | | | 1 |
| Spokane, Wash. | Los Angeles, Calif. | | | 5 |
| (Prosser, Wash. ( | Fresno, Bakersfield, Glendale, Burbank, Los Angeles, Calif. | | | 1 |

## APPENDIX
## FROZEN BERRIES

| Origin | Destination | 1957 | 5/1/58 | 5/2/58 to December 1959 |
|---|---|---|---|---|
| Portland, Oreg. | Los Angeles, Calif. | 5 | 3 | 29 |
| Portland, Oreg. | Long Beach, Calif. | 1 | | 1 |
| Portland, Oreg. | San Francisco, Calif. | 4 | 1 | 23 |
| Portland, Oreg. | Burbank, Calif. | | | 2 |
| Portland, Oreg. | Fresno, Calif. | | | 3 |
| Portland, Oreg. | Covina, Lynwood, Lakewood, LaMirada, Calif. | | | 1 |
| (Portland, Oreg. | Culver City, Bell, Inglewood, Torrence, Long Beach, Hermosa Beach, Calif. | | | 1 |
| ( | | | | 6 |
| Portland, Oreg. | Sacramento, Calif. | | | 2 |
| Portland, Oreg. | San Leandro, Calif. | | | 1 |
| Portland, Oreg. | Sherman Oaks, Calif. | | | 3 |
| Portland, Oreg. | Oakland, Calif. | | | 1 |
| Portland, Oreg. | Riverside, Calif. | | | |
| Salem, Oreg. | Los Angeles, Calif. | 1 | | |
| Hillsboro, Oreg. | Los Angeles, Calif. | 1 | | |
| Forest Grove, Oreg. | Los Angeles, Calif. | 1 | 4 | 4 |
| Eugene, Oreg. | Buena Park, Calif. | | | 2 |
| Eugene, Oreg. | La Habra, Calif. | | | 1 |
| Stayton, Oreg. | Glendale, Fresno, Los Angeles, Calif. | | | 1 |
| Stayton, Oreg. | San Francisco, Calif. | 1 | | 2 |
| Stayton, Oreg. | Sacramento, Calif. | | | 2 |
| Gresham, Oreg. | Fresno, Los Angeles, Calif. | | | 1 |
| Gresham, Oreg. | San Francisco, Calif. | 1 | | |

## FROZEN BERRIES

| Origin | Destination | 1957 | to 5/1/58 | 5/2/58 to December 1959 |
|---|---|---|---|---|
| Milwaukee, Oreg. | Los Angeles, Calif. | | | 1 |
| Chehalis, Wash. | San Francisco, Calif. | | | 2 |
| Puyallup, Wash. | Sherman Oaks, Calif. | | | 2 |
| Puyallup, Wash. | Los Angeles, Calif. | | | 2 |
| Olympia, Wash. | Hayward, Calif. | | | 2 |
| Ridgefield, Wash. | Los Angeles, Calif. | | | 4 |
| Prosser, Wash. | Los Angeles, Calif. | | | 1 |
| Lynden, Wash. | Los Angeles, Calif. | | | 3 |
| Tacoma, Wash. | Fresno, San Francisco, Calif. | | | 1 |
| Fresno, Calif. | Gresham, Oreg. | | | 3 |
| Fresno, Calif. | Portland, Oreg. | | | 1 |

## APPENDIX
## FROZEN VEGETABLES

| Origin | Destination | 1957 | 5/2/58 to 5/1/58 | 5/2/58 to December 1959 |
|---|---|---|---|---|
| Portland, Oreg. | Sacramento, Calif. | 1 | | 9 |
| Portland, Oreg. | Glendale, Calif. | | | 3 |
| Portland, Oreg. | Los Angeles, Calif. | | | 8 |
| Portland, Oreg. | Fresno, Calif. | | | 3 |
| Portland, Oreg. | Hayward, Calif. | | | 3 |
| Portland, Oreg. | Berkely, Calif. | | | 2 |
| Portland, Oreg. | Santa Clara, Calif. | | | 5 |
| Portland, Oreg. | San Leandro, Calif. | | | 5 |
| Portland, Oreg. | Oakland, Calif. | | | 6 |
| Portland, Oreg. | Monterey, Paterson, Calif. | | | 2 |
| Portland, Oreg. | San Francisco, Calif. | 2 | 1 | 19 |
| (Portland, Oreg. | Culver City, Burbank, Bell, Inglewood, Torrence, Long Beach, Hermosa Beach, Modesto, San Jose, Riverside, Calif. | | | 1 |
| Gresham, Oreg. | San Francisco, Calif. | 1 | 1 | 2 |
| Gresham, Oreg. | Oakland, Calif. | | | 1 |
| Gresham, Oreg. | Los Angeles, Calif. | | | 2 |
| Stayton, Oreg. | San Francisco, Calif. | 1 | | 1 |
| Stayton, Oreg. | Patterson, Calif. | | | 1 |
| Stayton, Oreg. | Fresno, Calif. | | | 2 |
| (Stayton, Oreg. | Glendale, Sacramento, Los Angeles, Calif. | | | 1 |
| Weston, Oreg. | San Francisco, Calif. | | 1 | 2 |
| Weston, Oreg. | Los Angeles, Calif. | | | 6 |
| Weston, Oreg. | Fresno, Calif. | | | 6 |
| Weston, Oreg. | San Luis Obispo, Calif. | | | 3 |

## FROZEN VEGETABLES

| Origin | Destination | 1957 | to 5/1/58 | 5/2/58 to December 1959 |
|---|---|---|---|---|
| Weston, Oreg. | Glendale, Calif. | | | 5 |
| Weston, Oreg. | Monterey, Calif. | | | 4 |
| (Weston, Oreg. | Bakersfield, Sacramento, | | | |
| ( | Riverside, San Leandro, Calif. | | | 1 |
| Salem, Oreg. | San Francisco, Calif. | | | 1 |
| Salem, Oreg. | Hayward, Calif. | | | 1 |
| Pendleton, Oreg. | Salinas, Calif. | | | 1 |
| Dayton, Oreg. | Los Angeles, Calif. | | | 1 |
| Sunnyside, Oreg. | Glendale, Calif. | | | 1 |
| Milton-Freewater, Oreg. | Alameda, Calif. | | | 2 |
| Albany, Oreg. | San Francisco, Calif. | | | 1 |
| Sumner, Wash. | Pasadena, Calif. | 1 | | |
| Sumner, Wash. | Los Angeles, Calif. | 1 | | 4 |
| Sumner, Wash. | San Francisco, Culver City, Calif. | | | 1 |
| Everett, Wash. | Los Angeles, Calif. | | | 1 |
| Everett, Wash. | San Francisco, Calif. | | | 1 |
| Kent, Wash. | San Francisco, Calif. | | 2 | |
| Stanwood, Seattle, Kent, Wash. | Los Angeles, Calif. | | 1 | |
| Chehalis, Wash. | San Francisco, Calif. | | | 2 |
| Sunnyside, Wash. | Glendale, Los Angeles, Calif. | | | 1 |
| Olympia, Wash. | Hayward, Calif. | | | 2 |
| Arlington, Wash. | Alameda, Calif. | | | 1 |
| Prosser, Wash. | Oakland, Calif. | | | 2 |
| Prosser, Wash. | Sacramento, Calif. | | | 2 |
| Prosser, Wash. | Glendale, Calif. | | | 2 |

## FROZEN VEGETABLES

| Origin | Destination | 1957 | 5/1/58 | 5/2/58 to December 1959 |
|---|---|---|---|---|
| (Prosser | Fresno, Bakersfield, Burbank, Hayward, Los Angeles, Yuba City, San Leandro, Calif. | | | 1 |
| Modesto, Calif. | Portland, Oreg. | 1 | | |
| San Francisco, Calif. | Seattle, Wash. | | 1 | |
| Modesto, Calif. | Vancouver, Wash. | 1 | | |
| Salinas, Calif. | Seattle, Wash. | | | 1 |

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## ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 14th day of February, A.D. 1961.

No. MC-117724

### PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

*It is ordered,* That said application, except to the extent granted in said report, be, and it is hereby, denied, effective April 3, 1961.

*And it is further ordered,* That unless compliance is made by applicants with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

## APPENDIX E

SERVICE DATE
NOVEMBER 1, 1961

INTERSTATE COMMERCE COMMISSION

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No. MC-117724

PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION

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*Decided October* 24, 1961.

Upon reconsideration, findings in prior report, 84 M.C.C. 451, decided February 14, 1961, affirmed. Applicants found entitled to continue operations as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, from and to specified points in Oregon, Washington, and California, by reason of having been engaged in such operations on and continuously since May 1, 1958. Issuance of a certificate approved upon compliance by applicants with certain conditions, and application in all other respects denied.

Appearances as shown in the prior report and, in addition, *John M. Hickson* for applicants.

### REPORT OF THE COMMISSION ON RECONSIDERATION

WALRATH, COMMISSIONER:

By application filed October 20, 1958, under the "grandfather" provisions of section 7(c) of the Trans-

portation Act of 1958, Frank P. Battaglia, Louis Roberti, and Thomas Torchia, copartners doing business as Produce Transport Dispatch, of Portland, Oreg., seek a certificate of public convenience and necessity authorizing the continuation of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of bananas, frozen fruits, frozen berries, and frozen vegetables, between points in Oregon, Washington, and California. Subsequently, at the hearing held at Portland on December 8, 1959, applicants requested and the joint board allowed an amendment broadening the scope of the original application. By said amendment applicants seek, in addition to the authority originally applied for, authority as a common carrier by motor vehicle, over irregular routes, of exempt commodities including, but not limited to, frozen poultry, fresh cabbage, fresh oranges, fresh eggs, fresh squash, fresh dry onions, fresh avocados, frozen fish, frozen fish products, fresh fruits, and fresh vegetables, when transported in mixed shipments with bananas, frozen fruits, frozen berries, and frozen vegetables, between points in Oregon and Washington on the one hand, and, on the other, points in California.

In the prior report, 84 M.C.C. 451, decided February 14, 1961, Division 1 granted applicants the authority described in our findings herein. The Division, however, rejected the amendment to the application, which had previously been accepted by the joint board, and denied applicants' request for mixed-shipment authority. Thereafter, on June 29, 1961, applicants' petition for reconsideration was denied. On August 21, 1961, however, on

our own motion, we reopened the proceeding for reconsideration on the present record.

Although we agree with the ultimate conclusions set forth in the prior report, we think the Division erred in refusing to accept the amendment to the application by which applicants seek mixed-shipment authority. In rejecting the amendment, Division 1 reasoned that it was compelled to do so because applicants had failed to tender the amendment within the statutory period (120 days following August 12, 1958) for the filing of "grandfather" applications under section 7 of the Transportation Act of 1958. The division concluded that to allow a late-tendered amendment, which would broaden the scope of the original application, would be tantamount to the acceptance of a new application in violation of that section. We think it clear, however, from the District Court opinion in *Herrett Trucking Co.* v. *United States,* 14 Fed. Car. Cas. #81,380 (E.D. Wash., 1961) that section 7 does not preclude the Commission, as a matter of law, from accepting later tendered amendments to "grandfather" applications. Rather, we think it is within the discretion of the Commission to allow such amendments, provided that the original application for authority has been timely filed. We also believe that the present case is one in which our discretion in this area should be exercised and that the amendment should be accepted for consideration on its merits. Although the applicants did not offer the amendment until the date of the hearing, the protesting carriers were given sufficient advance notice of their intention to do so. Hence, there was no element of undue surprise in the request

that the application be amended. Secondly, the amendment did not materially broaden the issues previously presented so as to cause any delay, administrative or otherwise.

Pursuant to our previous discussion we have considered applicants' amendment on its merits. We find, however, that the evidence does not warrant the granting of the mixed shipment authority sought by applicants in their amendment. The record reveals that applicants commenced transportations of mixed-shipment loads on June 24, 1957, and between that date and April 23, 1958, handled approximately a dozen of such loads. There is no proof, however, that applicants were participating in this traffic after the critical date, May 1, 1958, and consequently the evidentiary requirements of section 7(c) that a carrier be in operation continuously since that date have not been met.

Aside from our comments and conclusions regarding applicants' proposed amendment, we find that the findings in the prior report herein are in accordance with the evidence and the applicable law, and such findings will be affirmed.

We find, on reconsideration, that applicants were, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of:

(1) Frozen fruits, from Portland, Oreg., to Sacramento, Calif.;

(2) Frozen berries, (a) from Portland, Oreg., to Los Angeles, Long Beach, and San Francisco, Calif.;

(b) from Stayton and Gresham, Oreg., to San Francisco, Calif.; and (c) from Forest Grove, Oreg., to Los Angeles, Calif.; and

(3) Frozen vegetables, (a) from Portland, Oreg., to Sacramento and San Francisco, Calif.; (b) from Gresham, Stayton, and Weston, Oreg., to San Francisco, Calif.; and (c) from Sumner, Wash. to Los Angeles, Calif.;

and have so operated since that time; that a certificate authorizing the continuance of such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicants with the requirements of sections 215, 217, and 221(c) of the act, and with our rules and regulations thereunder, within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

An appropriate order will be entered.

## ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 24th day of October, A. D. 1961.

No. MC-117724

## PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION

*It appearing,* That on February 14, 1961, the Commission, division 1, made and filed its report, 84 M.C.C.

451, and order in the above-entitled proceeding, granting the said application in part:

*It further appearing,* That by order entered August 21, 1961, we reopened the said proceeding for reconsideration on the present record on our own motion;

*And it further appearing,* That reconsideration of the matters and things involved has been given, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the report of February 14, 1961, are hereby referred to and made a part hereof:

*It is ordered,* That said order of February 14, 1961, be, and it is hereby, vacated and set aside.

*It is further ordered,* That said application, except to the extent granted in said report on reconsideration, be, and it is hereby denied, effective December 11, 1961.

*And it is further ordered,* That unless compliance is made by applicants with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| FRANK P. BATTAGLIA, LOUIS ROBERTI, and THOMAS TORCHIA, dba. PRODUCE TRANSPORT DISPATCH, | ) | CIVIL No. |
| Plaintiffs, | ) | 61-321 |
| vs. | ) | ORDER |
| UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, | ) | AND JUDGMENT |
| Defendants. | ) | |

It appearing to the Court that the order of the Commission dated October 24, 1961, is supported by substantial evidence and is not arbitrary or capricious,

NOW, THEREFORE, the order of the Commission is hereby affirmed and this action dismissed.

Dated this 29th day of March, 1962.

STANLEY N. BARNES
United States Circuit Judge
GUS J. SOLOMON
United States District Judge
JOHN F. KILKENNY
United States District Judge

## APPENDIX G

## CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SERVICE DATE
NO. MC-124603* OCTOBER 1, 1962

FRANK P. BATTAGLIA AND THOMAS TORCHIA, A PARTNERSHIP, DOING BUSINESS AS PRODUCE TRANSPORT DISPATCH, PORTLAND, OREGON

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 1st day of October, A.D., 1962

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby granted this Certificate of Public Convenience

*Application No. MC 117724 originally filed in the name of Frank P. Battaglia, Louis Roberti, Alice Roberti, Administratrix, and Thomas Torchia, a partnership, doing business as Produce Transport Dispatch, Portland, Oreg., but pursuant to No. MC-FC 65055, the above-named partnership was substituted as applicant and No. MC-124603 was assigned thereto.

and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuant of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

*Frozen fruits,*

From Portland, Oreg., to Sacramento, Calif., with no transportation for compensation on return except as otherwise authorized.

*Frozen berries,*

From Portland, Oreg., to Los Angeles, Long Beach, and San Francisco, Calif., with no transportation for compensation on return except as otherwise authorized.

From Stayton and Gresham, Oreg., to San Francisco, Calif., with no transportation for compensation on return except as otherwise authorized.

From Forest Grove, Oreg., to Los Angeles, Calif., with no transportation for compensation on return except as otherwise authorized

*Frozen vegetables,*

From Portland, Oreg., to Sacramento and San Francisco, Calif., with no transportation for compensation on return except as otherwise authorized.

From Gresham, Stayton, and Weston, Oreg., to San Francisco, Calif., with no transportation for compensation on return except as otherwise authorized.

From Sumner, Wash., to Los Angeles, Calif., with no transportation for compensation on return except as otherwise authorized.

By the Commission, division 1.

(SEAL)

HAROLD D. MCCOY,
Secretary.

## APPENDIX H

SERVICE DATE
MAY 28, 1963

### ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of May, A.D. 1963.

No. MC-117724

PRODUCE TRANSPORT DISPATCH COMMON CARRIER "GRANDFATHER" APPLICATION

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicants, filed February 26, 1963, for waiver of Rule 1.101(e) of the General Rules of Practice;

(2) Petition of applicants tendered for filing February 26, 1963, for reopening for reconsideration;

(3) Reply by Exley Express, Inc., protestant filed March 11, 1963;

(4) Joint reply by Class I rail carriers in the Western District, and the Pacific Southwest Railroad Association, protestants, filed March 18, 1963;

and good cause appearing therefor:

*It is ordered,* That Rule 1.101(e) of the General Rules of Practice be, and it is hereby waived, and the

petition in (2) above be, and it is hereby, accepted for filing;

*It is further ordered,* That the petition in (2) above be, and it is hereby, denied, for the reasons that the findings of the Commission in its report on reconsideration of October 24, 1961, are in accordance with the evidence and the applicable law; and that no sufficient cause appears for granting the relief sought.

By the Commission.

HAROLD D. McCOY
Secretary.

(SEAL)

Office-Supreme Court, U.S.
FILED
OCT 12 1966
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 564

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH
*Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON*

## MOTION OF RAILROAD APPELLEES TO AFFIRM

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

---

**No. 564**

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH
*Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON*

---

## MOTION OF RAILROAD APPELLEES TO AFFIRM

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Pursuant to Rule 16 of the Revised Rules of this Court, the appellees listed in the appendix hereto move that this Court affirm the judgment of the District Court on the ground that the judgment is so clearly correct that plenary review of this Court is not warranted.

## QUESTIONS PRESENTED

We do not agree with appellants' statement of questions presented. We believe the questions presented are the following:

1. Whether this suit is precluded by reason of the final order and judgment of the District Court for the District of Oregon entered March 29, 1962, affirming the order of the Interstate Commerce Commission determining the scope of "grandfather" rights established by appellants.

2. Whether the Commission's order denying appellants' petition for leave to file a third petition for reconsidera-

tion long after time had expired under its Rules of Practice and long after entry of the aforementioned order and judgment was a clear abuse of discretion.

3. Whether, assuming arguendo that the foregoing questions are held not to be determinative, the Commission's order delineating appellants' "grandfather" rights is supported by substantial evidence and is not arbitrary or capricious.

## STATEMENT

We disagree with most of the legal conclusions and argumentative matter contained in appellants' Statement of the Case. For the purposes of this motion, we agree with the statement to the extent it is factual, with the following exceptions:

We do not find record evidence establishing that appellants hauled mixed loads of frozen fruits, frozen berries, and frozen vegetables, or any combination thereof, as they here claim, (J.S. 7).

Appellants state (J.S. 8) that given numbers of origins and destinations in Oregon, Washington and California were served before and continuously after the critical date. It will be hereinafter shown that most were served only before *or* after the critical date and that repetitive movements established were very limited.

With reference to the request (J.S. 13) that the Commission be compelled to hold further hearing, we point out that at no stage of this proceeding have appellants made such a request of the Commission, although its Rules of Practice[1] make provision therefor. And, further, that in neither court case was the District Court requested to remand for the purpose of holding further hearing.

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1. Rules 1.101(a) and 1.101(b). (49 C.F.R. 1.101(a) and 1.101(b)).

## ARGUMENT

This appeal presents no question warranting plenary consideration by this Court. It involves only a repetitious suit involving the same cause of action upon which there is already a final judgment on the merits by a court of competent jurisdiction, and an attempt to persuade this Court that the Commission's rejection of a successive petition for reconsideration tendered some thirty-three months after the time for filing had expired constitutes a clear abuse of discretion. We show below that those issues are determinative and that appellants' contentions to the contrary are without merit. We also show that, in any event, the "grandfather" certificate issued to appellants fully meets the prescribed standards and that the Commission's action is based upon substantial evidence and is not arbitrary or capricious.

### 1. This Suit is Precluded by Reason of the Prior Order and Judgment of the District Court.

The Commission's order of October 24, 1961, delineated the "grandfather" rights of appellants. That order was judicially reviewed by the District Court for the District of Oregon, which by order and judgment entered March 29, 1962, dismissed appellants' complaint on the merits (J.S. 54). No appeal was taken.

This subsequent action was brought in the same forum. The parties and the issues are the same. The ultimate question sought to be adjudicated is whether the affirmed Commission order reasonably and properly determined appellants' "grandfather" claim. That is precisely the question which was judicially determined in the prior action.

This suit is precluded. For, it is a repetitious suit involving the same cause of action upon which a court of compe-

tent jurisdiction has entered a final order on the merits. The parties were thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose, even in a subsequent action on a different cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591; *Hoag* v. *New Jersey*, 356 U.S. 464.

Although no authorities are offered in support of such a position, appellants seemingly urge that their case presents an exception to the general rule by reason of so-called new law that was made after the District Court's first judgment. It is not necessary to examine the legal significance of that contention, for the plain fact is the pertinent law has remained the same since this Court enunciated it in 1942.

All of the cases relied upon by appellants are bottomed upon *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, in which this Court established standards for evaluating claimed "grandfather" rights under the similarly worded original motor carrier enactment. In the 1964 *Shaw* case[2] —which appellants say inspired the filing of the second suit, albeit they waited more than a year before doing so—this Court again affirmed the *Carolina* criteria and required the Commission to apply them to Shaw's operation.

The *Shaw* case made no new or different law. This Court merely told the Commission to apply the standards prescribed some twenty-two years before in the *Carolina* case.

The Commission's initial order shows on its face that the Commission considered the *Carolina* standards. All parties to the first court proceeding called attention to them. If appellants felt the District Court misapplied them, they should have appealed that case to this Court. It is not

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2. *Willis Shaw Frozen Express, Inc.* v. *U. S., et al.*, 377 U.S. 159.

enough to claim that reaffirmation by this Court of a decision it handed down some twenty-two years before and which stood unquestioned in the interim constitutes momentous new and different law and hence makes inoperative rules precluding this subsequent action.

Moreover, the unappealed prior decision became the law of the case, and whether the law was subsequently changed is of no consequence. *Adriaanse* v. *U. S.*, 184 F. 2d 968 (2nd Cir. 1950), Cert. Den., 340 U.S. 932.

**2. The Commission's Rejection of Appellants' Third Petition Tendered Grossly Out of Time, Was a Proper Exercise of Its Broad Discretionary Powers.**

Pursuant to appellants' first petition for reconsideration, the Commission entered its order on October 24, 1961. The District Court affirmed on March 20, 1962. After denial of their second petition for reconsideration on May 28, 1963, appellants, on August 6, 1964, filed their petition for waiver of Rule 1.101(e) of the Commission's General Rules of Practice[3] (49 C.F.R. 1.101(e)) and tendered for filing their third petition for reconsideration. By order served November 18, 1964, the Commission denied the request for leave to file and rejected the petition.

Although in the District Court appellants made no such claim in their Petition for Decree or on brief, they now contend that the Commission clearly abused its discretion in declining to entertain their third petition for reconsideration tendered some thirty-three months later than its rules permit and some twenty-nine months after entry of the aforementioned order and judgment of the District Court.

---

3. (e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order.

The courts have long recognized that administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge, as quickly as possible, their many duties.

If litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that an administrative agency could ever enter an order that would not be subject to reopening. Rehearings are not a matter of right, but are pleas to discretion, not to a reviewing court, but to the Commission. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503.

Disposition of appellants' petition for leave to file a third petition grossly out of time was a matter within the Commission's discretion. No showing that the Commission clearly abused its discretion or that it acted arbitrarily or capriciously has been made.

**3. The Commission Correctly Applied Applicable Standards. Its Order Confers Substantial Parity, Is Supported by Substantial Evidence, and Is Not Arbitrary or Capricious.**

As pointed out by appellants (J.S. 14), the purpose of the "grandfather" clause was to assure to involved carriers substantial parity between prior bona fide operations and future operations.

The Commission's order granted to appellants all of the operating authority that the record can possibly sustain. Grant of more would have exceeded substantial parity, and would have been nothing more than a windfall which Congress did not confer.

Appellants cite several "grandfather" cases in which the

Commission was reversed. Those decisions are not here relevant due to the dissimilarity of controlling facts.

None holds that as a matter of law the Commission is bound to treat frozen fruits, frozen berries and frozen vegetables as a single class of commodity. The cited decisions dealing with that issue merely say that the involved carriers in those cases established as a *fact* that in *their* operations the three commodities were one class. In the instant case, there are no facts of record to substantiate a determination that appellants or their shippers handled the three classes as one.

No cited case holds that, as a matter of law, the Commission is bound to confer an area-wide authority. Here again, the *facts* in individual situations control. The appendix to the Commission's order of February 14, 1961,[4] (J.S. 41-46) lists every shipment handled by appellants from the inception of their frozen food operations in March, 1957, (J.S. 6) to the date of hearing in December, 1959. It graphically reveals that very few repetitive movements were handled, that few traffic patterns were established, and that the Commission granted every bit of authority conceivably substantiated by the evidence.

It shows, among other things, that of the two California origins served prior to the critical date, none was served subsequently; that of four Washington origins served at any time, only two were served prior and only Sumner was served after the critical date; that frozen fruits were transported both prior and subsequent to the critical date only from Portland, Oregon to Sacramento, California; that in four instances, the Commission granted authority notwithstanding the fact that only one prior and one subsequent shipment was transported; and that the Commission

4. Affirmed by its order of October 24, 1961.

granted authority in every instance in which there was both a prior and a subsequent movement.

Appellants insist that it was error of law not to grant authority to transport all three commodities between all points in Oregon and Washington, on the one hand, and, on the other, all points in California. If only the fact there was not a single recurring movement from a single California origin is considered, the extremely tenuous position of appellants is exposed.

Substantial, as distinguished from incidental, sporadic or infrequent, service is required to substantiate a "grandfather" claim. It is necessary to establish actual rather than potential or simulated service. A holding out to serve an area is not alone sufficient. *U. S.* v. *Carolina Freight Carriers Corp., supra.*

Where, as here, there is no underlying operation of substance upon which to base a claimed holding out to serve between such broad, productive areas, such claim is ineffective.

The cases cited by appellants have no application to the facts in the instant case. The Commission's order is supported by the evidence. Its action was not arbitrary or capricious. It and the court below applied proper criteria, and the granted operating rights conferred full parity.

## CONCLUSION

The appeal presents no substantial question warranting review by this Court, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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October, 1966

## APPENDIX

### NAMES OF RAILROAD APPELLEES

The Atchison, Topeka and Santa Fe Railway Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Dodge, Des Moines & Southern Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad Company
Northern Pacific Railway Company
St. Louis-San Francisco Railway Company
Soo Line Railroad Company
Southern Pacific Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 564

FRANK P. BATTAGLIA AND THOMAS TORCHIA, D/B/A PRODUCE TRANSPORT DISPATCH, APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON*

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

## STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A) dismissing appellants' suit to set aside an order (J.S. 21–22) of the Interstate Commerce Commission. The basic issue is the validity of the Commission's partial denial of appellants' application for motor-carrier "grandfather" authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573, Appendix, *infra*,



235-143—66

p. 7) to transport frozen fruits, berries, vegetables and other commodities.

Section 7 amended the agricultural-commodities exemption of the Interstate Commerce Act (Section 203(b)(6), 49 U.S.C. 303(b)(6)) to require a Commission certificate or permit for the interstate motor transportation of specified commodities, including frozen fruits, frozen berries, and frozen vegetables. To protect the interests of carriers already engaged in such transportation, Section 7(c) (the "grandfather" clause) provided that, upon timely application, the Commission, "without further proceedings," would issue a certificate or permit to any person who, on May 1, 1958, and continuously thereafter, was "in bona fide operation" in the motor transportation of the commodities involved.

On October 14, 1958, appellants filed an application for "grandfather" authority to transport frozen fruits, frozen berries, frozen vegetables and certain other produce commodities from any points in Oregon and Washington to any points in California. After a hearing (J.S. App. C), the Commission found that appellants' operation had not been so extensive as claimed, and the Commission granted appellants authority to transport each of the frozen commodities only between specified points (J.S. App. D). The Commission's ruling was affirmed by a three-judge district court on March 29, 1962 (J.S. App. F), and appellants did not appeal.

On February 26, 1963, appellants asked the Commission for leave to file a petition for reopening and recon-

sideration. The Commission accepted the petition for filing, but denied reconsideration, on the ground that its prior findings, sustained by the district court, were "in accordance with the evidence and the applicable law" (J.S. App. H). On August 14, 1964, appellants again asked the Commission for leave to file a petition for reconsideration, arguing that under this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159, they were entitled to broader authority. The Commission denied the petition. It held that the *Shaw* decision was not in conflict with the district court's decision upholding its previous order and that there was "no sufficient or proper basis" for reconsideration of its findings (J.S. App. B).

On appeal, the district court upheld the Commission's order "on the ground that the Commission did not abuse its discretion in denying the petition for reconsideration on the grounds set forth in the Commission order" (J.S. 19). The court further held that "no adequate ground * * * has been shown" for vacating the court's earlier judgment (J.S. App. A).

## ARGUMENT

We believe that this appeal presents no substantial question warranting plenary consideration by this Court. The legal standards of the grandfather clause of Section 7(c) were fully considered by this Court in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159, and the present case involves only the application of those standards to the particular facts. After the *Shaw* case, a number of applicants asked

the Commission for leave to file petitions for reconsideration, on the general ground that they were entitled to broader authority than had been granted by the Commission. Each of those petitions was determined on its particular facts. Where the Commission concluded that the applicant was entitled to broader authority, the petition was granted and the Commission's prior decision reconsidered in light of the *Shaw* decision.[1] In other cases the Commission concluded that the *Shaw* decision did not warrant any different result in the scope of an applicant's grandfather authority, and the petitions were denied.[2] That was the course followed here and we submit it comported with the *Shaw* decision.

In *Shaw,* this Court reaffirmed that Section 7(c) contemplates the issuance of a certificate which will maintain a "substantial parity between future operations and prior *bona fide* operations" (*United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 481) and that the extent of the carrier's *bona fide* operations is measured by "the standard of substanti-

[1] *E.g., Albany Food Products, Inc., "Grandfather" Application,* 98 M.C.C. 618, sustained *sub nom. Exley Express, Inc. v. United States,* Civil Action No. 65-427, D. Ore. (June 27, 1966), appeal pending, No. 644, O.T., 1966; *Colonial Refrigerated Transport, Inc. "Grandfather" Application,* MC-115841 (Sub-No. 48); sustained *sub nom. Colonial Refrigerated Transportation, Inc.* v. *United States,* 255 F. Supp. 999 (N.D. Ala.), notice of appeal filed.

[2] *E.g., Coast Refrigerated Transport Co., Contract Carrier "Grandfather" Application,* MC-117421 (Sub-No. 1), August 6, 1964; *Exley Express, Inc., Common Carrier "Grandfather" Application,* MC-114290 (Sub-No. 2), March 21, 1966.

ality of service" (*ibid.*). The Court added that this determination necessarily involves a judgment on such matters as the applicant's "status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of [the applicant] to perform the services" (377 U.S. at 160).

The authority granted appellants by the Commission achieves substantial parity with their prior *bona fide* operations. In contrast to the cases they cite (J.S. 10–11, 15), appellants had commenced operations only a short time before the "grandfather" date (May 1, 1958), and during the critical period they had conducted only a limited, point-to-point operation. Despite the fact that they were serving one of the major producing areas for these frozen commodities (Oregon, Washington, and California), by the time of the "grandfather" date they had transported only 5 shipments of frozen fruits, 16 of frozen vegetables, and 23 of frozen berries (84 M.C.C. at 457–458). The Commission's conclusion that such operations failed to justify broad, area-wide authority was entirely reasonable; "[w]hile service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service" (*Carolina Freight Carriers, supra,* at 481). The limited number and unrelated character of their shipments of the commodities in question also support the Commission's factual determination that in this case these commodities should not be treated as one class of property.

Thus, whatever the precise scope of an individu
carrier's "grandfather" rights under Section 7(c)—
subject of continuing litigation [3]—the decision belo
we submit, turns on its particular facts and is corre

## CONCLUSION

The judgment of the district court should
affirmed.

Respectfully submitted.

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[3] Since this Court's decision in *Shaw*, five Section 7(c) cas
have been filed in the district courts. In two such cases t
Commission decision has been sustained (*Colonial Refrigerat
Transport, Inc.* v. *United States*, *supra*, n. 1; and *Exley E
press, Inc.* v. *United States*, *supra*, n. 1); in one case the Co
mission's decision was reversed (*Willis Shaw Frozen Expre
Inc.* v. *United States*, Civil Action No. 1918, W. D. Ark., M
31, 1966); and two cases are still pending (*Lester C. Newt
Trucking Co.* v. *United States*, Civil Action No. 2508, D. De
*Winter Garden Co.* v. *United States*, Civil Action No. 545
E.D. Tenn.).

## APPENDIX

Section 7(c) of the Transportation Act of 1958 (72 Stat. 573, Historical Note following 49 U.S.C. 303), provides in pertinent part:

> Subject to the provisions of section 210 of the Interstate Commerce Act [section 310 of this title], if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act [this chapter] by paragraph (a) of this section [amending subsec. (b)(6) of this section], in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act [this chapter] and within one hundred and twenty days after the date on which this section takes effect [August 12, 1958]. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes

effect [August 12, 1958] is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect [August 12, 1958], continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act [this chapter].

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# In the Supreme Court of the United States

OCTOBER TERM, 1966

## No. 564

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH,

*Appellants,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

*Appellees.*

*On Appeal from the United States District Court for the District of Oregon*

## BRIEF OF APPELLANTS OPPOSING MOTIONS TO AFFIRM

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*On Appeal from the United States District Court for the District of Oregon*

## BRIEF OF APPELLANTS OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16(3) of the Revised Rules of this Court, appellants file this brief opposing the motions to affirm filed herein by the railroad appellees and the United States and Interstate Commerce Commission.

### STATEMENT

The statement of the case is set forth on pages 6 through 13 of appellants' Jurisdictional Statement. Rail-

road appellees take exception to the factual statements therein contained chiefly with respect to evidence in the record supporting appellants' assertion that frozen vegetables, berries, and fruits were transported in mixed loads. The location in the record of such evidence will be hereinafter specified.

The argument in railroad appellees' Motion proceeds along three lines:

(1) That the instant action is precluded by the doctrine of res judicata (at 3-5).

(2) That the Commission's denial of appellants' request for leave to file a petition for reconsideration of their "grandfather" application was a proper exercise of administrative discretion (at 5-6).

(3) That the proper standards were applied by the Commission in determining the scope of "grandfather" authority and the Commission's grant of "grandfather" authority to appellants conferred substantial parity (at 6-8).

Interestingly enough, the United States and the Commission in their motion to affirm do not argue the applicability of the doctrine of res judicata or the discretionary power of the Commission to summarily deny appellants' request for leave to file a petition for reconsideration.

It should be noted that in neither motion do appellees demonstrate that the standards pronounced by this Court in *Willis Shaw Frozen Exp., Inc.* v. *United States,* 377 U.S. 159 (1964), were actually or in effect applied

by the Commission in its "pre-Shaw" grant of "grandfather" authority to appellants. The reasons why such a demonstration is impossible are hereinafter developed.

## ARGUMENT

### 1. The Willis Shaw standards were not applied by the Commission in delineating the scope of appellants' "grandfather" authority.

Preceding judicial review in *Willis Shaw Frozen Exp., Inc.* v. *United States,* Civil Action 1655, W.D. Ark., Feb. 11, 1963, reversed 377 U.S. 159, the Commission (in 89 M.C.C. 377) granted that carrier the right to haul frozen vegetables, berries, and fruits from named origins to named destinations and then, considering frozen vegetables, berries, and fruits separately made other point-to-point grants, and thus completely "atomized" Shaw's "grandfather" rights. On appeal, the district court decision sustaining the Commission's grant was reversed in a per curiam decision May 4, 1964, in which this Court stated:

> "We think *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971, requires reversal of the judgment and a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services." (*Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* 377 U.S. at 159-160.)

This Court's decision in *Shaw* was foreshadowed and explained by the following district court decisions which pointed out in detail the errors the Commission was making in its "tabulator" approach in disposing of "grandfather" rights applications under the Transportation Act of 1958: *Winter Garden Company* v. *United States,* 211 F. Supp. 280 (E.D. Tenn. Oct. 22, 1962); *Jarman* v. *United States,* 219 F. Supp. 108 (D.Md. June 18, 1963); *Frozen Food Express* v. *United States,* 219 F. Supp. 131 (N.D. Tex. July 8, 1963); and *Hale Distributing Company* v. *United States,* 221 F. Supp. 266 (S.D. Cal. July 10, 1963).

While some of the errors pointed out by the district courts in the above decisions are not relevant to the instant case, all such errors resulted from the Commission's basically incorrect conception of its responsibility, the end result of which was "grandfather" grants so narrowly drawn as to bear no reasonable relationship to the purpose of the "grandfather" clause—to grant to those coming under regulation authority to continue existing operations.

The Commission, in its required reconsideration of the Shaw application (99 M.C.C. 141), concluded that the *Frozen Food Express* case, *supra,* correctly interpreted the *Winter Garden Company* case, *supra,* in holding that frozen vegetables, berries, and fruits may be found as a matter of fact to have been handled as a single commodity class. In its reconsideration of the Shaw application the Commission then stated:

"It is manifest that our function in administer-

ing the 1958 'grandfather' Act is not to freeze an applicant's operations into a precisely delineated, point-for-point operation exactly corresponding to points where shipments have previously moved if, in fact, that applicant has held itself out and provided service to representative points throughout a particular area or territory."

*Prior* to the *Shaw* decision, the Commission considered frozen vegetables, berries, and fruits separately as a matter of law. The following quotation from the Commission's report dated February 14, 1961 (J. S. at 37-38) is a typical statement of the Commission's former position:

"We do not agree with applicants' contention that shipments of the three involved commodities transported by them should be viewed collectively in establishing their bona fide operation. . . Section 7 of the Transportation Act of 1958 clearly enumerates several *specific classes* of commodities, including frozen fruits, frozen berries, and frozen vegetables, to which 'grandfather' applications may be directed. In our opinion, applicants here must establish their bona fide operation separately with respect to each commodity class involved.

"Bearing in mind the above, we believe that applicants have established the right to a certificate authorizing operations only from and to the points served by them both on and after the critical date as described in our findings." (The emphasis is the Commission's own.)

Were the Commission to reconsider its grant of "grandfather" authority to appellants *in the light of*

*the Shaw decision,* a conclusion that the three commodities were transported as a single class seems inevitable.

Although the railroad appellees state in their Motion at page 2 that they cannot find record evidence establishing that appellants hauled mixed loads of frozen vegetables, berries, and fruits, the shipment exhibits show approximately: 30 mixed shipments of vegetables and berries; 12 mixed shipments of vegetables and fruits; and 6 mixed shipments of berries and fruits transported after May 1, 1958. Of the shipments transported before the critical date, there was 1 mixed shipment of frozen vegetables and fruits and 1 mixed shipment of frozen vegetables and berries. Upon examination of these exhibits it can be found that many of the appellants' loads contained mixtures of frozen vegetables, berries, and fruits.

Since the Commission limited its consideration of appellants' operations to just those shipments before May 1, 1958, *which were repeated* after that date, identical both as to exact commodity and as to points of origin and destination, it was able to find that "Applicants have not transported any of the subject commodities to or from more than four points in any State involved." (J.S. at 38.) So confined, obviously the Commission was:

> ". . . unable to view these points served as sufficiently representative to warrant a finding that applicants' operations were substantial throughout the State-wide areas involved. We are not persuaded that we should take official notice, as requested by applicants, that the changing business

characteristics in the industries which applicants serve require flexible carrier service and that this fact should be considered in determining the scope of the grant here. While this situation, in truth, may exist, we do not believe that the relatively limited operations by applicants which occurred on or prior to May 1, 1958, appear compatible with the fact of which they seek to have us take notice." (J.S. at 38.)

As above appears, by reason of its self-imposed limitations, the Commission so confined its consideration of the facts of appellants' "grandfather" operations that the transportation characteristics of the three commodities were completely obscured.

As found by the Commission (J.S. at 35), 44 shipments were transported before the critical date. These shipments originated from 7 points in Oregon, 4 points in Washington, and 2 points in California. The shipments terminated at 2 points in Oregon, 2 points in Washington, and 5 points in California.

The 289 shipments transported after the critical date originated from 13 points in Oregon, 14 points in Washington, and 2 points in California. The shipments terminated at 3 points in Oregon, 3 points in Washington, and 37 points in California.

The large number of origin and destination points indicated in the shipment exhibits is evidence, not previously considered by the Commission, that origin and destination points change from year to year, which is attributable to the special characteristics of the com-

modities. Indeed, the very fact that a number of origin and destination points were served before but not after the critical date verifies the shifting nature of the origins and destinations. Only a grant of areawide authority under such circumstances allows continuance of the operations conducted on the critical date. An award of point-to-point authority in a situation where origins and destinations shift from year to year means that when the traffic thereafter shifts from a specified origin point or destination point to some other origin or destination point, however close to the specified point, a portion of the granted authority becomes worthless, and within a few years' time probably all of the granted point-to-point authority will be of little use. However, the Commission, prior to the *Shaw* decision, mechanically concluded that unless a shipment was made after the critical date which coincided with a shipment before the critical date, the carrier had failed to sustain the burden of proving continuity of operation between the two points.

It should also be noted that the Commission gave no consideration whatever to the holding out of appellants to transport frozen vegetables, berries, and fruits within the desired territory, and testimony that the points of origin and destination were subject to frequent change was limited by the examiner at the Commission hearing (Tr. 28-33). Surely it cannot be said that the Commission observed the *Shaw* guidelines by so circumscribing its consideration of the evidence of appellants' "grandfather" operations. Indeed, it is clear from its "pre-Shaw" determination herein (J.S. App. D)

that the Commission was observing restrictive criteria which were later condemned.

From the foregoing it seems more than probable that if the Commission reconsidered its grant of "grandfather" authority and applied the guidelines laid down in *Shaw* and in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), an enlarged grant of authority to appellants would ensue and substantial parity between appellants' future operations and prior bona fide operations would be assured.

The railroad appellees depreciate the significance of the *Shaw* decision to be but a simple reminder to the Commission to apply the 22-year-old standards laid down in the *Carolina* case. (Railroads' Motion at 4.) These appellees contend that the four district court decisions resulting in remands to the Commission, *supra,* are "not here relevant due to the dissimilarity of controlling facts." (Railroads' Motion at 7.) Surely railroad appellees will not argue with the proposition that the legal standards applied to all applications involving "grandfather" grants under the Transportation Act of 1958 should not vary from case to case. As for the facts of the various court decisions being dissimilar, reference to those cases will confirm that the facts of all are remarkably similar, as might be expected. At least, the various district courts felt that the facts were similar. All three district court decisions following the *Winter Garden* case, *supra,* cited that case and commented on the similarity of the factual situations insofar as the peculiarities of the traffic were concerned.

**2. The Commission abused its discretion in denying appellants' request for leave to file a petition for reconsideration.**

As stated by the United States and the Interstate Commerce Commission in their motion to affirm, subsequent to the *Shaw* case a number of applicants asked the Commission for leave to file petitions for reconsideration. "Where the Commission concluded that the applicant was entitled to broader authority, the petition was granted and the Commission's prior decision reconsidered in light of the *Shaw* decision." (Government's Motion at 4.) We submit that it was an abuse of the Commission's discretion to deny leave to file a petition for reconsideration and reject a tendered petition where, as here, it is so clearly established that the legal standards which were applied were improper. How can the Commission possibly determine whether an applicant is entitled to broader authority until it first applies the correct legal standards, as enunciated in the *Shaw* and *Carolina Freight* decisions? Presumably the Commission, under the veil of administrative discretion, made a private determination as to whether application of the correct legal standards would affect the results previously determined by the application of incorrect legal standards. Appellants do not dismiss the possibility that application of the correct standards will not result in a broader grant of "grandfather" authority. However, they believe they are entitled to something more than just the Commission's bare statement that the proper standards have now been applied but the result remains the same.

The Commission's grant of "grandfather" authority to appellants is contaminated in its entirety by the application of erroneous legal standards. The legal standars formerly employed by the Commission narrowed its consideration of the facts presented at the hearing to the extent that the transportation characteristics of these seasonal agricultural products were given little, if any, weight.

Whether application of the proper legal standards to the facts of appellants' "grandfather" operations would change the result is not the concern of the courts. The result can be considered to be proper only when the Commission has reconsidered the application on its merits and has used and observed the correct, lawful standards.

Railroad appellees dwell extensively on the time lag in the various proceedings involving appellants' grant of "grandfather" authority and the desirability of finality of administrative action. Appellants would remind railroad appellees that complaints arising from the Commission's use of incorrect legal standards have been voiced since the first grant of "atomized" authority under the Transportation Act of 1958. Footnote 3 to the Government's Motion lists five section 7(c) cases that were filed since this Court's decision in *Shaw,* of which two are still pending (Government's Motion at 6). The Commission created the problem, not appellants. To sum up in the words of Commissioner Brown, who still dissented to the report of the Commission upon reconsideration of the Willis Shaw "grandfather" application (99 M.C.C. 141):

> "What sound regulatory purposes could justify an approach that would prolong litigation almost 7 years? What irreparable harm would have ensued if the Commission had taken a liberal approach earlier?"

**3. The 1962 District Court judgment does not preclude this action.**

The contention of appellees that the proper legal standards were applied by the Commission in determining the scope of appellants' "grandfather" operations is weak and indefensible. Thus it is quite understandable that the railroad appellees would raise the question of res judicata. (Railroads' Motion at 3-5)

Res judicata would not seem to be involved if this case is considered simply as one involving an abuse of discretion by the Commission in failing to entertain appellants' petition for reconsideration of its "grandfather" application in the light of the *Shaw* decision. In any event, the doctrine of res judicata should not be applied here. As this Court stated in *State Farm Mutual Ins. Co.* v. *Duel,* 324 U.S. 154 at 162:

> ". . . res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation."

It may be, as railroad appellees emphasize in their Motion at page 4, that the *Shaw* decision made no new or different law; that the law has remained the same since the 1942 *Carolina* case. But there was certainly a change in the law as previously applied by the Com-

mission. Clearly there has been an intervening decision (*Shaw*) and an altered situation has been created.

## CONCLUSION

For the reasons above stated appellants request that the Court deny the motions to affirm and note probable jurisdiction of this appeal. As set forth in the Jurisdictional Statement, appellants have respectfully suggested, as an alternative, that the District Court below be summarily reversed and this case be remanded to the Commission for reconsideration inasmuch as the Commission's error is plain and can be rectified by reconsideration by that agency.

Respectfully submitted,

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